THE RIGHT AND DUTY OF CONGRESS TO RECOGNIZE WAR IN CUBA.

SPEECH

OF

HON. JOHN W. DANIEL,

OF VIRGINIA,

IN THE

SENATE OF THE UNITED STATES,

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The Senate having under consideration the joint resolution (S. R. 26) declaring that a condition of public war exists in Cuba and that strict neutrality shall be maintained—

Mr. DANIEL said:

Mr. PRESIDENT: The distinguished Senator from Maryland [Mr. WELLINGTON] seems to have taken a shot at creation on the motion to refer the pending resolution. This joint resolution introduced by the Senator from Alabama [Mr. MORGAN] recognizes a state of public war in Cuba, and upon that resolution he has discussed tariff, currency, and the late and the prospective Administrations of our Government in various ramifications; but in so far as he has spoken to the matter in hand, the points which he makes seem to be in but a small compass.

It seems to me, Mr. President, that the remarks of the Senator are based upon an entire misapprehension of the character of the joint resolution, and upon an entire misconception of the feeling which actuates Senators who will give their support to it. In the first place, the joint resolution does not in the least involve an act of hostility to Spain. There is no writer upon international law with whom I have any familiarity, and there is no publicist of accepted reputation as an authority upon such subjects, who contends that it is not within the competence of any nation to recognize a state of public war in another without giving any ground of offense to the nation against which that public war exists on the part of a revolutionary body.

It is a curious incident of the civil war in this country which took place some thirty years ago that the President of the United States, Abraham Lincoln, was the first to recognize a state of public war, and it was held by the Supreme Court of the United States in the Prize Cases, reported in 2 Black, that the recognition made by him by a proclamation of blockade was in the line of humanity.

The next point which the Senator makes is an appeal to our sympathy with Spain, and he says we should not recognize a state of public war against Spain, whatever may be the fact as to its existence, because Columbus discovered America. [Laughter.] It is a great pity that Columbus ever did discover America if the inhabitants of the new continent are to bring to America the savagery that prevailed here before they came. If we can not have Christian civilization in America, and if we are bound to look with cold indifference upon acts which would shock even a savage breast, some might consider it a pity that the ships which brought the newcomers to our shores were not lost upon the ocean and had ever populated the new-found clime.

HUMANITY A RECOGNIZED GROUND FOR INTERNATIONAL INTERVENTION.

For my part, Mr. President, I shall address myself to-day for the most part to a very narrow feature of the debate. There are a number of Senators in this Chamber who sympathize with the joint resolution and who believe there is a state of public war in Cuba, and indeed the late President of the United States, whose policy in this regard is so much admired by the Senator from Maryland, in his message to the Congress of the United States, seemed to evince consciousness of a state of public war in Cuba, though he did not make any formal recognition thereof.

However, he did hold out to Congress, in his message, a picture of the condition of affairs in Cuba, and did use language which it seems to me is eminently appropriate and applicable to the case, whatever may be the time which the Congress of the United States may select to apply the doctrines and principles which he asserts.

I have deemed it not amiss—

He says in his message of last December—

to remind the Congress that a time may arrive when a correct policy and care for our interests, as well as a regard for the interests of other nations and their citizens, joined by considerations of humanity and a desire to see a rich and fertile country, intimately related to us, saved from complete devastation, will constrain our Government to such action as will subserve the interests thus involved and at the same time promise to Cuba and its inhabitants an opportunity to enjoy the blessings of peace.

And the injunctions of neutrality that emanated from the Administration carried equally strong suggestions of existent public war in Cuba.

So, Mr. President, while the late Administration by no means distinguished itself in the exhibition of any peculiar sympathy with the people of the neighboring Island of Cuba, who are only struggling to be free, it did recognize the fact that, according to principles of international law and under the duty which we owe to a neighboring country with which we are intimately related, a continuance of the condition of affairs which has harrowed the very soul of this nation might bring a time to pass when we should do something.

The Administration did not undertake to say what that thing was; it only spoke of it in general terms; but it indicated the principle that humanity to a neighboring country with which we are intimately associated was a good ground for such action as the United States Government might see fit in its pleasure to take to intervene in the affairs of Spain and the insurgent Cubans.

THE PENDING RESOLUTION DOES NOT INVOLVE INTERVENTION.

Mr. President, the pending resolution, however, is not a proposition of intervention. No international-law writer and no publicist of repute is of opinion that the mere recognition of a state of war in a neighboring nation or in any nation is an intervention in favor of one side or the other; and, where the recognition of belligerency is made, it is generally based upon the doctrine that it is a humane observance by the nation which makes the recognition, and that all of its influence is toward philanthropy and the cultivation of civilized usages in the conduct of war.

THE POWER OF CONGRESS TO ACT BY ORDER OF JOINT RESOLUTION.

Mr. President, there is no doubt in my mind that Congress has the power, by joint resolution or by any act passed in pursuance of any of its legitimate powers, to recognize either the belligerency

or the independence of a new state. For instance: To Congress is confided by the Constitution the sole power to regulate commerce among the States and with foreign nations. If Congress to-morrow were to pass an act for the regulation of commerce, and were in that act so to regulate commerce as to recognize in the body of the act either the belligerency or the independence of the new Cuban state, there is no one, as I conceive, who could deny the legitimacy of its action.

So it seems to me that Congress may, by order or joint resolution, subject to the approval of the President and subject also to its passage by Congress without the approval of the President, accomplish any purpose which it might accomplish by a direct act dealing with any portion of the subject-matter.

I will read the provision of the Constitution, which is to be found in Article I, section 7:

> Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Any subject-matter which is the proper subject-matter of an act of Congress may be also a proper subject-matter of an order, resolution, or vote, and we may very often accomplish in a shorthand way, by a resolution, order, or vote, that which if put in the form of a bill would require prolix details to effect.

The recognition either of the belligerency or the independence of a new state is in effect a regulation of commerce, for there goes, as a necessary corollary to the proposition that a certain state is in a condition of belligerency or in the consummation of independence, those rules of international law which apply to a state in that status; and the very declaration of belligerency or independence on the part of the Congress of the United States, with the approval of the President, or if passed over his veto by the necessary vote, would be an immediate regulation in certain respects of commercial relations with the countries affected by it.

VARIOUS CONTENTIONS AS TO EXECUTIVE AND CONGRESSIONAL POWERS.

But, Mr. President, I wish now to examine the views which have been presented by certain Senators as to the exclusive prerogative of the Executive in this regard. It is contended by some that the President of the United States has the power to recognize the belligerency or the independence of a foreign nation. Second, that the power is exclusive, plenary, and determinative. Third, that his power can not be overruled by a treaty between the United States and any foreign nation, or by any act of Congress, or by any order, resolution, or vote of Congress, even though such act, order, resolution, or vote be passed over the President's veto by a two-thirds vote of both Houses of Congress.

THE CORRECT VIEW.

It is contended upon the other hand that, while the President has power to recognize the belligerency or independence of a foreign nation whenever he must deal, as the Executive, with the fact that it exists in a state of belligerency or independence, this power is not exclusive, plenary, and determinative, so that Congress may not deal with the same matter of fact in the form of a law.

It is contended also that the power of the Executive is subordinate to the treaty-making power of the United States, located by the Constitution in the President and the Senate, which may also deal with the fact as it exists. It is contended, too, that the Executive power is subordinate also to the legislative power of the United States, located by the Constitution exclusively in the Congress and exercisable as prescribed therein with or without the approval of the President.

And, finally, that recognition may be made by Congress, by order, resolution, or vote, as well as by the passage of a bill. To put the matter in other words, it is contended, and I contend: First, that the President may recognize the independence or belligerency of a foreign nation, and his right to do so when it arises is an Executive right which is exclusive to him in the sense that he alone may exercise Executive functions; second, that the treaty-making power may make the like recognition, in which case that power is exclusively in the President and the Senate: and third, that the lawmaking power may also make such recognition, either indirectly by the exercise of some implied power arising out of its stated powers, or directly, since by acting directly it only accomplishes in a shorthand method of legislation that which it has the legitimate power to accomplish by a measure in detail. But when Congress acts, its action is, of course, subject to the Executive veto and subject also to that veto being overridden by itself.

WHAT BELLIGERENCY MEANS.

Let us now first define the terms we have to deal with. Belligerency is a word of Latin origin. It comes from bellum, war, and gerere, to carry on. A belligerent is a person carrying on war. Belligerency is the state or the condition of a person carrying on war. Nations do not deal with persons in other nations who are carrying on or participating in mere riots, fights, mobs, which are private wars. They do to a degree deal with all persons who are carrying on public war, and in an international sense belligerency is the state of those persons who are carrying on public war.

War is that state in which a nation prosecutes its right by force. So says the Supreme Court of the United States in the Prize Cases in 2 Black, 666, and that case is fruitful in apt expressions which define and describe belligerent conditions and rights.

Judge Grier, in that case, says: "The parties belligerent in a public war are independent nations," but he immediately qualifies this expression by observing, "but it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights against the other."

It is undoubtedly appropriate for Congress, in taking notice of the condition of affairs in Cuba, to move with caution and with due respect to every condition and suggestion; and to recognize a state of war existing in a foreign community without recognition of the independence of the party, people, community, or district which is conducting that war against an older state is the most moderate and fitting form of action, until at least the insurgents have shown themselves competent to maintain independence.

BELLIGERENCY AND INDEPENDENCE ARE MATTERS OF FACT.

The independence or the dependence of a nation is simply a matter of fact. The belligerency or peaceful condition of a nation is also a matter of fact. Anyone may in a mental sense recognize

any fact. This, indeed, can not be prevented. Anyone may, so far as his personal conduct is concerned, govern himself according to the fact, unless prohibited by some paramount law which controls his conduct. If the fact of which he takes mere mental cognizance becomes in itself a paramount force, overriding the sanctions of law, the individual has the right to recognize that paramount force and govern himself accordingly, no matter what may be the interdict of municipal law.

Out of this principle arises all the learning about governments de facto; that is, governments which exist as facts and which may be recognized by those whom they control, or whom they deal with, as facts, whatever they may be in legal abstract contemplation. A government de facto is the government of paramount force. This is the language of Judge Clifford in Ford *vs.* Surget, 97 United States Reports, 617.

WHAT RECOGNITION MEANS.

Recognition is the mere act of recognizing. It is a mental act primarily, a perception of the mind. It is consciousness that a given object is identical with an object previously cognized or known or previously existent as an ideal of the mind. Knowing what a state of war is, the mind cognizes this abstract condition, and to recognize a particular state of war means to identify actual conditions as constituting what in the abstract is a state of war.

From this original meaning the term has passed into a secondary meaning: that is, to signify a formal avowal or acknowledgment of the object or condition which is cognized. In an international or political sense the word "recognition" is used to express forma acknowledgment of one government by another as an independent sovereignty or as a belligerent nation. The opposite of the word "recognize," as we are told by the lexicographers, is to "disown," or some kindred word, as the opposite of "acknowledgment" is to deny or to conceal.

IMPORTANCE OF THE SUBJECT.

It is important when there is a change in the condition of a nation so fundamental as that of peace to war and important when a new independent nation appears in the family of nations that the facts be intelligently dealt with as soon as possible. Such facts can not be regarded with indifference by any nation. Sometimes the one or the other of them creates so great an emergency that it must be dealt with instantly, and in most cases commerce and the vast ramifications of business dependent upon it are so greatly affected that a conjunction arises of the most profound public concern.

THE QUESTION OF RECOGNITION IS A CONSTITUTIONAL QUESTION.

The executive power in a nation, always continuous, always on the alert, and always apprised of current events by its foreign ministers and ambassadors, consuls, agents, and correspondents, is in the nature of things the most ready and available agent of national action, and in it in Great Britain and other monarchical nations is generally reposed the sole authority to make the appropriate recognitions. But in the United States, Mr. President, this is a constitutional question, and it is one in which we might be gravely misled if we were to seek its interpretation by reference to the practice of the British Government, from which so many of our legal and constitutional principles are derived.

DIFFERENCES BETWEEN THE PRESIDENT OF THE UNITED STATES AND THE MONARCH OF GREAT BRITAIN.

The British executive is a hereditary monarch. The powers of the monarch are neither conferred nor limited by a written constitution. They are the growth of the ancient and immemorial customs of the realm, and some of them yet smack of the times when kingship and absolutism were almost synonymous terms, the good old times when "the king could do no wrong."

The differences between our Executive and the King of Great Britain were well pointed out by Alexander Hamilton in the Federalist, where he observed:

"Our President is elected for four years," and is to be eligible as often as the people of the United States think him worthy of their confidence. A King of Great Britain "is an hereditary monarch, possessing the crown as a patrimony descendible to his heirs forever."

The President of the United States—

He continues—

would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable, no punishment to which he can be subjected without involving the crisis of a national dissolution.

In brief, Mr. President, taking the sense of Hamilton's essay, and contemplating the fact as we all know it to exist, the President of the United States, instead of being an executive with the possession of prerogatives handed down from generation to generation and consecrated by custom, is himself a mere creature of law and under the law, and has his great office for the most part in simply seeing to it that the laws are faithfully executed. Mr. Hamilton continues:

The President of the United States is to have power to return a bill which shall have passed the two branches of the legislature for reconsideration, and the bill so returned is not to become a law unless upon that reconsideration it be approved by two-thirds of both Houses.

The King of Great Britain, on his part, has an absolute negative upon the acts of the two Houses of Parliament.

So, Mr. President, the President of the United States, being the creature of the Constitution and under the laws made in pursuance thereof, has no such veto power as exists in the monarch of Great Britain, who may destroy and kill a measure, whether it be a bill, a joint resolution, or any other form of parliamentary action, but can only act in an advisory relation to Congress with regard to it, disapproving it by his veto, indeed, but leaving it subject to be passed over his head by the sedate action of that body and by the necessary vote.

As to the President's part in treaties and the difference between his part in making a treaty and the part played by the English monarch, Mr. Hamilton says:

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. The King of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can, of his own accord, make treaties of peace, commerce, alliance, and of every other description.

BRITISH PRECEDENTS INAPPLICABLE HERE.

It has seemed to me, Mr. President, that those gentlemen who have contended that the President alone can exercise the power of recognition when there is a state of war in a foreign nation or

when a new state has made itself independent have reached their conclusions from the analogies of the English constitution and not from a sufficient reflection upon our own. The monarch of Great Britain is possessed of prerogatives which our Constitution has not conferred on our Executive. The monarch of Great Britain is the sole treaty-making power of the realm.

The monarch of Great Britain may destroy a bill utterly and completely by his absolute veto power. The monarch of Great Britain may recognize the independence or belligerency of a foreign nation by royal prerogative, which has existed for ages; and to attempt so to construe our Constitution, which was made in order to differentiate our President from the English executive, and to pattern on the model of British precedents, is to commit, as I conceive, a gross and fundamental error.

Mr. CAFFERY. Will I interrupt the Senator if I ask him a question?

Mr. DANIEL. Not at all.

Mr. CAFFERY. It is the constitutional power of the President to accept and receive ambassadors, and does not that power give him a constitutional right to recognize belligerency or to recognize a de facto government by implication?

Mr. DANIEL. I will speak to that point presently, for I intend to advert to it fully; and I will then give my learned friend from Louisiana the views of Madison and Hamilton upon that subject, which have much greater weight than any which I could myself suggest.

CONSTITUTIONAL PROVISIONS.

In the light of these introductory views, Mr. President, we look to the Constitution of the United States to see in whom is lodged the authority to recognize the independence or belligerency of a foreign nation. We find the powers of government therein clearly delineated as follows:

Article I, section 1, puts the legislative power of this Government foremost, and evidently discloses the fact that it is in the legislative branch of this Government that the great mass of powers is confided. It says:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article II says:

> The executive power shall be vested in a President of the United States of America.

Article III says:

> The judicial power shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

EXCLUSIVE POWERS OF THE PRESIDENT.

Without going through a prolix recitation of the detailed provisions of the Constitution, I turn to see what are the exclusive powers of the President according to its letter and spirit.

Undoubtedly the article declaring that executive power shall be vested in the President of the United States is an investiture of the President with sole executive functions. He has also power under that instrument to be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into actual service of the United States, to require the opinion in writing of the principal officer in each of the Executive Departments, to grant reprieves and pardons, to nominate ambassadors, other public ministers, and consuls, judges of the Supreme

Court, etc., to fill all vacancies that may happen during the recess of the Senate by granting commissions, to give to Congress information of the state of the nation, on extraordinary occasions to convene both Houses, in case of disagreement of the two Houses with respect to the time of adjournment he may adjourn them to such time as he shall think proper, to receive ambassadors and other public ministers, to take care that the laws be faithfully executed, and to commission all the officers of the United States.

These are certainly the principal executive powers conferred upon the President of the United States, and we must look to them to see whether they confer upon him any power to recognize the belligerency or independence of a foreign nation.

Looking over the Constitution, we ask ourselves the question, In which clause is the President, or the President and the Senate, or the Congress, given the power to recognize such belligerency or independence, and is such power exclusive in the department to which it is given in the sense that no other department can exercise it?

THE COMMANDER IN CHIEF IS UNDER THE REGULATIONS OF CONGRESS.

Are we to say that the President has power to recognize belligerency or independence because he is exclusively vested with the power as Commander-in-Chief of the Army and Navy? I do not think that such a power can be deduced from that office, certainly not in any sense which would deprive Congress of the power to limit the exercise of that office. The military function in the Constitution is added to the President's civil function to enable him to move and order troops, but the war-declaring function is solely in Congress.

And, furthermore, the Congress has power expressly "to make rules for the government and regulation of the land and naval forces," and the President, in being made a part of them as their chief, comes immediately himself under "the rules and regulations" made by law for their government. Instead of the President being "sacred and inviolable" and surrounded by "that divinity which doth hedge about a king," he is made by the Constitution subject to the military rules and regulations which Congress itself may establish.

If he should invoke his military character to recognize a foreign nation as belligerent or independent (and it may become necessary for him in certain exigencies to invoke that character and to exercise it), we must remember that he invokes also the superior power of Congress, under whose rules and regulations he may be controlled in the exercise of that power.

Mr. Hamilton says on this subject, in the Federalist:

> The President is to be Commander-in-Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to him. It would amount to nothing more than the supreme command and direction of the military and naval forces as first general and admiral of the confederacy, while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies, all of which, by the Constitution under consideration, would appertain to the Legislature.

There have been cases in which the President of the United States has had attributed to him certain powers to act with regard to the recognition of war as incident to his duties as Commander-in-Chief; but when he acts as Commander-in-Chief it must be remembered that he acts under the superior power of

Congress to regulate his action, and in no wise steps beyond the circle of legislative authority to make the laws which shall be his guide.

THE EXECUTIVE POWER TO NOMINATE AMBASSADORS.

Is it under the power to nominate ambassadors that there is attributed to the Executive the exclusive power to recognize belligerency or independence? Certainly he could not recognize the belligerency of a foreign nation under the power of nominating ambassadors, because belligerency does not involve the question of sending an ambassador. Certainly he can not derive exclusive power to recognize independence from the right to nominate ambassadors, for if he desired to send an ambassador to a new foreign state he would be dependent upon the Senate to appoint him, and with the nomination would end the question of exclusive power.

But suppose that the President should regard a nation as independent and the Senate did not regard it as independent. Suppose he nominated an ambassador and the Senate refused to confirm him. The Executive power would thus be exhausted in the nomination. It would be snapped off and curtailed. Who could decide between the Senate and the President in the case of such a collision of views? Who, Mr. President, but the lawmaking power of this country, which is above both?

THE POWER OF THE EXECUTIVE TO RECEIVE AMBASSADORS.

Mr. DAVIS. Mr. President, will the Senator from Virginia allow me to interrupt him?

Mr. DANIEL. Certainly.

Mr. DAVIS. Suppose the President of the United States should receive an ambassador.

Mr. DANIEL. I am coming to that point now. Will we be told that the exclusive Executive power of recognition of independence or belligerency of a foreign state is deducible by necessary implication on the Executive authority "to receive ambassadors and other public ministers?" This is too slight a function for the attribution of so great a power to it, certainly in any exclusive sense. It is a mere ceremonial of state, belonging to the superficial, social relations of nations and to the etiquette of courts, rather than to the structure and genius of states and nations.

To receive an ambassador is to identify and greet him. It is not necessarily or naturally the power of ultimate decision whether or not there is a nation which may send an ambassador. The President may nominate an officer. Congress alone can create the office. The President may command armies and navies. Congress alone can raise, support, and maintain armies and navies, and regulate the conduct of those who compose them. The President may receive ambassadors, but Congress is the ultimate power that must say whether there is a nation competent to send them.

VIEWS OF HAMILTON, MADISON, AND RAWLE.

I will read in this connection what Hamilton said in the Federalist when he was discussing this subject, prior to the adoption of the Constitution:

The President—

He says—

is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of

dignity than of authority. It is a circumstance which will be without authority in the administration of the Government, and it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

Mr. Hamilton in later days modified his views upon this subject, and fell into such a vein of argument upon it as we are sometimes treated to in the Senate. In No. 3 of the letters of Helvidius will be found some comments of Mr. Madison upon the question which, it seems, are worthy of consideration:

Little—

Says he—

if anything more was intended by the clause than to provide for a particular mode of communication, almost grown into a right among modern nations, by pointing out the department of the Government most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it.

Again he says:

Had it been foretold in the year 1788, when this work [The Federalist] was published, that before the end of the year 1793 a writer, assuming the merit of being a friend of the Constitution, would appear and gravely maintain that this function, which was to be without consequence in the administration of the Government, might have the consequence of deciding on the validity of revolutions in favor of liberty, "of putting the United States in a condition to become an associate in war"—nay, "of laying the Legislature under an obligation of declaring war"—what would have been thought and said of so visionary a prophet?

So Mr. Hamilton, at the time of the adoption of the Constitution, as Madison, after it was adopted, never regarded this constitutional provision as carrying that force and effect which has been attributed to it by Senators, and certainly neither of them, nor any of our earlier statesmen within my knowledge, deduced the conclusion that the President had an exclusive right to control our foreign relations with respect to belligerency and independence through a mere ceremonial clause of the Constitution defining who should be the person to receive ambassadors who were sent to us.

I will in this connection cite the comment of an early writer upon the Constitution. Rawle, in his work on the Constitution, on page 195, uses this language:

The power of receiving foreign ambassadors carries with it, among other things, the right of judging, in the case of a revolution in a foreign country, whether the new rulers ought to be recognized. The Legislature, indeed, possesses a superior power, and may declare its dissent from the Executive recognition or refusal, but until that sense is declared, the act of the Executive is binding.

Mr. Rawle has stated the matter, as it seems to me, with nice legal discrimination, and that is what I take to be the law. I believe that the President in dealing with our foreign or domestic relations has the rightful power to realize and to recognize any fact which intervenes or affects his administration of the law, but it is from his vested authority to see to it that the laws are faithfully executed, and as he derives the power which he exercises to recognize belligerency or independence from the fact that he is the executor of the law, the very statement of his power implies the limitation that the law may regulate him in it or override him in it according to its constitutional will and pleasure.

THE PRESIDENT'S DUTY TO INFORM AND RECOMMEND TO CONGRESS.

Is the exclusive power which is attributed to the President traceable in any degree to the President's authority in the Constitution to give to Congress information as to the state of the Union, and to recommend to their consideration such measures as he shall judge necessary and expedient? I can not think so. On the contrary, that clause indicates the subordinate relation of the President to Congress in the treatment of facts which he has to deal with.

The state of the Union involves our foreign as well as our domestic relations, debt, taxes, imposts, excises, favorite nations, belligerent nations, foreign and State commerce, postal communications, science and art and their encouragement, courts, armies, navies, peace, and war—all that great diversity and complexity of affairs, world-wide and domestic, which are committed by the Constitution to the care of the lawmaking power. The President may give information touching any and every of those topics; he may relate facts as he perceives and interprets them; he may make recommendations touching them; but his information may be mistaken, for he is not infallible as to his view of any fact of which he treats; his recommendation may be rejected. He is not a dictator.

Suppose he is mistaken either in recognizing or in not recognizing the belligerency or the independence of another nation, is Congress forever tied and bound down by his mistaken perception or conception of a fact? No one can pretend that it is by any other fact, and that is to say that no one pretends to it, except as to those facts concerning which the Constitution has made the President's determination ipso facto conclusive.

If he says such and such a nation is independent, are we to be told that Congress must so accept it, although it may involve a change of status in all the subjects upon which Congress has power to legislate? If he says a nation is belligerent or not, is that to end it conclusively and forever? And, according to the recent doctrine that we have had urged upon us here by the State Department of the late Administration and by some Senators upon this floor, such action on the part of the President winds the whole matter up.

Neither the President nor the Senate by a treaty made afterwards, neither the Congress, with the approval of the President, nor by a law passed over his disapproval, no power on earth, according to their arguments, can alter or change or modify a statement of fact which one man has avowed to be true; that is to say, that a certain state is to be treated as dependent or independent, belligerent or peaceful; his ipse dixit has settled it for the day upon which he said it and for all time afterwards until some other President may come along and unsay it.

Mr. CAFFERY. Mr. President——

Mr. DANIEL. One moment, if the Senator pleases.

This is the one-man power in the most preposterous and attenuated shape that has ever appeared in this Republic. This is the one-man power modeled upon the power of an ancient British king acting by custom and without constitutional limitation.

Now I will hear the Senator's question.

Mr. CAFFERY. I desire to know of my distinguished friend, first, whether or not he claims that the authority on the part of the

President and Congress is concurrent in the matter of recognizing belligerency or independence; and if so, whether the exercise by either of those branches of the Government of this authority primarily does not conclude Congress having concurrent jurisdiction, or, in other words, whichever of the concurrent powers first exercises jurisdiction over this subject-matter, does not exhaust jurisdiction and fix the status either of belligerency or independence?

Mr. DANIEL. My learned friend has asked me two questions. I must separate them before I undertake to answer them.

In the first place, the Senator asks me if I maintain that the power of the President and Congress is concurrent. I would not use that word "concurrent" in describing the power as I conceive it to exist. I think the President of the United States has certain implied powers through the exercise of which, for the purpose of executing the law, he may recognize the fact that he has to deal with; but as that power is derived—and I hope presently to show it—in the main (if not in all cases, in nearly all cases) from his constitutional authority to take care that the laws are faithfully executed, that implies that when the law changes he must change with it; and the law is, in my judgment, the supreme power in the United States on that subject—above the Executive and above the treaty-making power. The President can only "inform" Congress as to facts, and recommend as to laws. He is a witness as to facts, and an adviser as to laws. But in making laws to apply to facts Congress has sole and exclusive power; is, therefore, sole and exclusive judge in a legislative sense: and the Presidential veto, subject to be overridden by Congress, is the only way in which he has the prerogative of participation in Congressional action.

Now, for the purpose of argument, before I finish answering the Senator's question, suppose the President and the Senate were to make a treaty upon certain subjects and find a certain condition of fact setting forth that certain nations were belligerent and certain others independent. The Senator would not contend that Congress might not come along and by a law set aside that treaty, for it is well settled that treaties may be set aside by law.

So if you can set aside a treaty made by both the President and the Senate, why may you not override a conclusion which the President himself has reached as to a fact which you propose to treat differently? Or, if the President's action is binding, it is only binding until the superior power has overruled it, and then it ceases to be binding.

I will meet the Senator's question, however, with an analysis of the President's power in several cases made by a quotation of judicial authority.

IN WHAT CASES THE PRESIDENT MAY RECOGNIZE FACTS BEFORE HIM.

I will say here, Mr. President, that I think that the President has the power impliedly in the exercise of his Executive function (1) to recognize the independence of a foreign nation; (2) also the belligerency of one foreign nation with another foreign nation; (3) also the belligerency of a foreign nation against this nation; (4) also the belligerency of any portion of this nation against itself; (5) also any local insurrection against Federal laws; (6) also to recognize any invasion of a State; (7) also, on application of a State legislature or a State executive when the legislature can not be convened, a case of domestic violence which calls for Federal interference.

THE GREAT EXECUTIVE POWER TO TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED.

But I contend that these cases of Presidential recognition are all traceable to the President's duty under the Constitution to take care that the laws are faithfully executed.

It may be when he is acting as Commander-in-Chief of the Army and Navy that a case may arise of an emergent nature in which that officer alone has opportunity and occasion to recognize the condition of war that he must deal with; but whether we trace his authority to the fact that he is Commander-in-Chief of the Army or Navy, or that he is simply acting as an Executive to take care that the laws are faithfully executed, it is the law always that is the fountain of authority under which he acts.

When an executive act is to be done, it does not follow that the same fact may not be a subject-matter of executive action on the part of the President and of a lawmaking act on the part of Congress; and when it is made the subject of a lawmaking act on the part of Congress, that act is the supreme law of this land to the President and to everyone in it, unless by holding up that law in comparison with the Constitution you can see that Congress has exceeded its power.

Mr. CAFFERY. Mr. President, my friend has been very indulgent, and I hope he will let me ask one more question. I have been very much struck with his exposition of his views upon this subject. I would inquire of him by what process of reasoning he deduces the power on behalf of Congress to recognize a matter of fact from the grant of legislative functions? In other words, whether a recognition of belligerency or a recognition of a de facto government by Congress comes within the purview by natural implication of the power generally to legislate; and if so, by what process of reasoning does he reach that conclusion?

Mr. DANIEL. The Senator from Louisiana has asked me two or three questions. Would he simply put only one now? What is the Senator's first question?

Mr. CAFFERY. My question is, Does the Senator deduce the power of the President to recognize the existence of a new government from a constitutional grant to receive ambassadors and ministers?

Mr. DANIEL. Not from that alone; but others have so construed his power.

Mr. CAFFERY. Well, from others.

Mr. DANIEL. Will my friend allow me to ask him how can the President of the United States derive power to recognize the belligerency of a foreign nation like the Cuban Republic, which sends no ambassador here, from his right to receive an ambassador, if it did send one?

Mr. CAFFERY. I do not myself derive the power of the President to recognize belligerency from his power to receive ambassadors.

Mr. DANIEL. From what source does the Senator deduce it?

Mr. CAFFERY. I deduce the power of the President to recognize the belligerency of a people warring against another.

Mr. DANIEL. From what power in the Constitution?

Mr. CAFFERY. From the general power in the Constitution that places the President in charge of our external relations.

Mr. DANIEL. What clause in the Constitution? I should like to have the Senator point it out.

Mr. CAFFERY. From the clause in the Constitution which authorizes him to send ambassadors to foreign countries.

Mr. DANIEL. I would ask the Senator to point out the particular phrase he relies on.

Mr. CAFFERY. To receive ambassadors, I mean.

Mr. DANIEL. Suppose a country does not send ambassadors?

Mr. CAFFERY. Then it is not a country, and nobody can war against it. There is no belligerency and no independence in question in such a case.

Mr. BACON. If the Senator from Virginia will permit me, I should like to say to the Senator from Louisiana that the President can not send an ambassador except by the consent of the Senate. He has no such power.

Mr. CAFFERY. Very well. When he sends his ambassador, with the consent of the Senate, to Spain or to England, that places him in possession of our external affairs with those countries. All matters of fact, all intelligence necessary to be known bearing upon the conditions in those countries comes within the purview of the President of the United States; and as belligerency is a fact, and as the President of the United States is the only branch of the Government having charge of the fact and the power to collect the facts, I deduce that the President of the United States is the proper power, and the only power, to pass upon a matter of fact involving belligerency. That is my deduction, whatever it may be worth.

Mr. SPOONER. Mr. President——

Mr. DANIEL. Mr. President, I will come to the point suggested in the question of the Senator from Louisiana in a few minutes, and then I will yield for a question to the Senator from Wisconsin.

Mr. CAFFERY. If my friend from Virginia will permit me a little further, I deduce the power to recognize the independence of a nation from the power to receive an ambassador or minister from that nation. I contend that when the President of the United States has accepted a minister, has received an ambassador, that his finding in the premises is conclusive.

Now, if my friend will pardon me a moment longer—I do not want to make a speech, and I shall be very short—he asked the question in a part of his discourse, as to whether or not when the President had found a certain state of facts existing which warranted him in recognizing an independent government, another branch of the Government could not overturn his finding. I think clearly not, and that whatever may be the jurisdiction of the President, whether it be exclusive or whether it be concurrent, his passing upon the matter primarily is conclusive.

Mr. SPOONER. Will the Senator allow me to ask him a question?

Mr. DANIEL. I will yield to a question, but it breaks the thread of my discourse to have other gentlemen make speeches in the body of mine. I should have great pleasure in hearing them, if they were not speaking when I have the floor.

Mr. SPOONER. I have no desire to make a speech.

Mr. DANIEL. I know that, and will yield to the Senator's question with pleasure.

Mr. SPOONER. I have listened attentively to the arguments of the Senator. I understand the Senator to concede the power of the President to recognize the belligerency or independence of

a nation, as the case may be. President Cleveland might, therefore, have recognized, had he chosen so to do, the belligerency of the Cuban insurrectionists or the independence of Cuba. Whence comes, in the Senator's opinion, the authority of the President to do that? Would it be pursuant to any act of Congress, or would he derive his power from the Constitution alone?

Mr. DANIEL. Mr. President, in answer to the Senator's question, I will read him first a passage from the second volume of Story on the Constitution, and I will make this passage my answer in some degree to the questions of the Senator from Louisiana [Mr. CAFFERY] and the Senator from Wisconsin [Mr. SPOONER].

In 1793 President Washington issued a proclamation forbidding the citizens of the United States to take any part in the hostilities then existing between Great Britain and France, warning them against carrying goods contraband of war and enjoining upon them an entire abstinence from all acts inconsistent with the duties of neutrality. He was assailed for this act, as our people sympathized with France, but it is well observed by Judge Story, in his Commentaries on the Constitution with reference to President Washington's action, as follows:

> If the President is bound to see to the execution of the laws and treaties of the United States, and if the duties of neutrality, when the nation has not assumed a belligerent attitude, are by the law of nations obligatory upon it, it seems difficult to perceive any solid objection to a proclamation stating the facts and admonishing the citizens of their own duties and responsibilities.

There is the touchstone principle, "the execution of the laws and treaties of the United States;" that is the great source of Presidential authority.

I admit that that is not a complete answer to the Senator from Wisconsin [Mr. SPOONER], because the belligerents in that case were established nations, but I make it a halfway house on my way to answer; and there is a clear, logical pathway to the conclusion that the President may recognize the belligerency of a new nation, since it is the belligerency that makes the occasion for the exercise of neutrality as provided for in our laws. I think, and the general public sense of this country concurs, that President Washington had the right—and such were the construction and view taken by the courts—to realize the fact that there was a war going on between Great Britain and France, and the greatest of our commentators on the Constitution, among the text writers who have written about it, predicates that power upon the great executive right to see to it that the laws are faithfully executed.

It is not difficult to deduce the power in that respect. Now, where the President may get the incidental and implied power to recognize the independence of a foreign nation that sends ambassadors here, or to whom he sends ambassadors, is also not difficult to arrive at.

There it is deducible from the Constitution as an incidental power. But the Senator asks me the question, Where, in the Constitution, does the President get the right to recognize the belligerency of a new people contending against an old-established government?

I could not get it at all unless it may be derived from the Executive authority to see to it that our laws are faithfully executed, and from the incidental power, inherent in our very nature, for any man who is charged with the execution of laws to use his five

senses to perceive the conditions under which they are being executed or attempted to be executed. I get it in the same way that I would that the commander at Governors Island would get power if a foreign fleet were to steam up New York Harbor to-morrow and were to open its guns upon Governors Island.

I do not think that any officer or noncommissioned officer or any private soldier of the United States would hesitate to train the guns of Governors Island upon the foreigner invading our country until he had waited to hear from Washington and had got an order from the Commander-in-Chief. So a policeman may arrest men for assault and battery when he sees them fighting, but that does not conclude their rights before courts nor conclude the legislature from making such laws as it sees fit regulating arrests for assault and battery and regulating the whole subject-matter. The President gets authority to recognize a fact from the constitutional fact that he is charged with the execution of the laws in this country and from the exercise of his five senses. Facts can not be fenced off from the recognition of anyone who has the duty devolved upon him to deal with them.

Mr. HOAR. Will the Senator allow me to put in one word?

Mr. DANIEL. Let me finish my sentence, and then I shall be very glad to do so.

The President gets his authority from the exercise of his five senses in contemplating the condition under which the laws are to be executed.

Mr. HOAR. I was about to——

Mr. DANIEL. No; one more moment; then I will yield. I remember——

Mr. HOAR. It was merely with reference to the sentence the Senator was on.

Mr. DANIEL. Just one more moment.

Mr. HOAR. Certainly.

Mr. DANIEL. I wish to complete my sentence.

Mr. HOAR. Certainly.

Mr. DANIEL. I hope the Senator will permit me to finish my thought.

Mr. HOAR. Certainly; I beg pardon.

Mr. DANIEL. I once had a friend who had been a cadet at West Point. Soon after he got to West Point the commandant sent officers around to ask the cadets of the guard what they would do under this circumstance or that, and they went to one and said, "What would you do if you were to see that the barracks were on fire?" He said, "I would call the officer of the guard." One cadet gave one answer, another cadet another answer. They came to this boy and asked, "What would you do?" He said, "I would halloo fire as loud as I could, and try to put it out as soon as I could get to it."

Any soldier, no matter what may be the situation, and any executive officer who is charged with the administration of a trust, has the right to realize and recognize a fact which confronts him in the exercise of that duty; but he may misperceive it as well as perceive it, and, in my opinion, the fact is not ultimately settled until dealt with by ultimate jurisdiction.

The power to declare war rests solely in Congress; but that did not prevent President Polk from sending American troops into Mexico when war, without being declared by this country, had been made upon it and Mexican troops had invaded our soil.

There is an inherent right in an intelligent being to exercise his five senses, and it is not denied to exist in any political body which represents sovereignty, except in the Congress of the United States, which we are told can not recognize a state of war, however flagrant, however patent, and however much it may affect our foreign and domestic relations.

Now, I yield to the Senator from Massachusetts.

Mr. HOAR. I think I ought to rise now only to apologize to the Senator. He was making such a beautiful statement of what I generally accord in that I wished simply——

Mr. DANIEL. I could make no statement that could not be bettered by a statement from the Senator from Massachusetts.

Mr. HOAR. I wish to ask the Senator if his point is not in substance that the power to recognize the fact——

Mr. DANIEL. Because it is a fact——

Mr. HOAR. Arises from the duty of acting upon the fact. That is all.

Mr. DANIEL. I think that is a very sententious and a very conclusive statement about it.

Mr. HOAR. I should like to ask the Senator a question, however, in regard to his criticism of the power of Congress. I do not wish to interrupt the thread of the Senator's discourse, but perhaps, now that he has been interrupted by another question, he may prefer to yield rather than before he resumes his argument.

Suppose on the 3d day of March, 1897, the two Houses of Congress, or either of them—I will say both of them—recognized Cuba as an independent and a belligerent and adjourned until next December, and thereafter, within ten days, the Cuban armies were overthrown in battle, surrendered, and all Cuba were at peace, and she, as far as she is a being, admitted the authority of Spain, is the President bound by that recognition to treat Cuba as an independent and as a belligerent until the first Monday in December, or so long thereafter as it takes Congress to come together and act?

Mr. DANIEL. I think not, for then the basis of action disappeared.

Mr. HOAR. Then is it not true that the question of belligerency is a question constantly changing from day to day and from week to week?

Mr. DANIEL. Undoubtedly.

Mr. HOAR. And that no power under the Constitution can bind the Executive power, which has the duty of acting upon the fact as it exists, because that duty of acting upon the fact as it exists must change with the changing facts?

Mr. DANIEL. I agree with the Senator.

Mr. HOAR. The Executive is here all the time. He is all the time our agent for communicating with foreign governments. He is not in session half of each year or a little over, like Congress, and from the necessity of the case must it not be that that power, except so far as it is incident to some act of Congress which is necessary, must be vested in him?

PRESUMPTION OF CORRECTNESS IN PRESIDENTIAL STATEMENTS OF FACTS.

Mr. DANIEL. The power is vested in any executive officer to recognize a fact with which he is charged by law with the responsibility of dealing. It is a natural power, and it is one that we can not eliminate from mundane affairs and human nature. The

world is full of facts. He that hath eyes to see, let him see. He that hath ears to hear, let him hear.

When Congress receives a statement of fact from the President, it is presumed to be true in every physical, moral, and legal aspect. This is but a common-law doctrine—all things official are presumed to be solemnly and rightly done. No one would imagine that the President would make false statement of a fact in a physical or moral sense, but he is liable to make a mistake as to the reality in a physical sense and in a legal sense also. If he says there is no public war in Cuba in a legal international sense, we may presume it to be true.

If he says the Cuban Republic is not independent in a legal and international sense, we presume it is true. In ninety-nine cases out of one hundred no dispute is ever raised as to a presidential statement of fact or assumption of fact. When he continuously recognizes Great Britain as an independent nation, there is no dispute about it; the matter ends. When he says there is a French Republic and recognizes it, the matter ends, there being no dispute about the existence of the fact.

When President Harrison said there was a Hawaiian Republic, there was no dispute about it, and it so ended. When, during this very winter, the Major Republic of Central America appeared, the President received its minister. There was no dispute about it. The Major Republic was recognized by everybody according to the fact which, without controversy, existed at the time he communicated and acted upon it.

But now suppose we traverse the view of the President that there is no public war in Cuba, if such be his view, and he has not yet said either that there is or is not. Suppose we traverse his allegation as to the Cuban Republic. Have we not the right to do it? Are we forever estopped by his mistaken view, if he takes a mistaken view? Are we bound by the supposititious fact as he saw it with his eyes? In short, is a possible Presidential mistake as to a fact which he communicates to Congress forever beyond remedy by the treaty-making power and by the lawmaking power?

NO EXCLUSIVE POWER IN THE PRESIDENT TO DETERMINE FOREIGN OR DOMESTIC FACTS.

In my judgment, the American people have a right to determine by their Senators and Representatives in Congress assembled the question of fact as it may concern any law which they have the power to pass, or any resolution which they have the power to pass, and I think that the menace from the State Department to Congress which was made some months ago, and its defiant attitude toward the lawmaking power of the Republic, can never affect the disposition of any independent, high-minded Senator or Representative to decide this question for himself under his oath of office.

I deny that the Constitution has anywhere hinted at the exclusive power of the President of the United States to determine any fact with relation to our domestic or foreign concerns, while I do not deny he may determine it for himself in so far as the execution of the laws may require him to do it as an Executive matter.

FACTS DETERMINABLE BY THE TREATY-MAKING AND THE LAWMAKING POWER.

Mr. President, I have tried to reason upon this subject without resort to precedents, or with very little allusion to them. In my judgment, the judicial precedents in this country are in favor of

my proposition; the necessary logic of the case seems to me to render it irrefutable. I will put a case. Suppose that the President of the United States were to-day to declare that the Cuban Republic is an independent republic; and suppose a new President of the United States to-morrow were to negotiate a treaty with Spain by which the United States made itself the ally of Spain and which recited that the United States would not recognize or would not treat the Cuban Republic as an independent nation, and were to declare war upon it, and prohibit commerce with it. Is there any man in the Senate bold enough to declare that the treaty-making power of the United States, confided by the Constitution of the United States in the President and the Senate, could not by that treaty override, wipe out, destroy, and render absolutely null and void any Presidential recognition which had previously occurred? So, if the treaty-making power may thus override positive action upon the part of the President of the United States, why may not the lawmaking power, which is superior to the treaty-making power, go along and override and destroy and wipe out both?

What the Senator from Massachusetts has suggested it seems to me is correct. A fact must be respected because it is a fact in the sense and in the conscience of the person who contemplates the fact, and the recognition of it is only binding during the period that its recognition is extant and efficient. Vesuvius, by its lava, might destroy Italy to-morrow: or, suppose it were a fact that it did. The independence of Italy, being an attribute, would go out with the destruction of the country, and a recognition of Italy to-day would not make an obligation upon us to recognize it to-morrow unless the fact remained there for the recognition to apply to.

Now, let me present a brief examination of some of the judicial precedents.

Mr. HOAR. Before the Senator passes to that point, if he is at the end of this subject, I should like to ask him one other question in regard to what he has just said, if it would not be disagreeable to him. The Senator made a very interesting suggestion, in which I entirely agree with him, which was that when, as he thinks, Mexico invaded this country, Mr. Polk was not bound to wait for an act of Congress, but it was his duty to repel the invasion as President of the United States, charged with the execution of the law.

The Senator will remember very well that a good many of the Whig party, including John Quincy Adams and a good many Northern Representatives, thought Mr. Polk was all wrong in his fact and voted against the resolution in the House of Congress that war existed by the act of Mexico.

Now, suppose that party had been strong enough to carry both Houses of Congress by a two-thirds vote and to pass an act declaring that war did not exist by the act of Mexico, that she was not invading us, and ordering the President not to repel the invasion. Would it have been any the less Mr. Polk's duty to do exactly what he did, to protect the country?

Mr. DANIEL. As I understand it, suppose Congress had not recognized a state of war, and had declared——

Mr. HOAR. To the contrary.

Mr. DANIEL. I think a condition of that sort would be so near anarchy that the President might seriously consider whether he had not better take the law in his own hands and defend the

country, whether Congress said so or not. It would be a case of Congressional revolution well-nigh impossible. I think that is a condition of anarchy.

Mr. HOAR. Will the Senator permit me to go a little further into the historical facts in connection with my question to make it clear? The Senator said, and it seems to me he is absolutely right, that it was within the constitutional power and was the constitutional duty of President Polk, Mexico, in his judgment, being a belligerent against us at that time, to repel them. Mr. Clay said at the same time, or just after, that he would sooner have laid down his life than to have subscribed to the resolution of the House of Representatives approving Mr. Polk's course and declaring that war existed by the act of Mexico.

Now, suppose Mr. Clay had had two-thirds vote of his followers, and that Congress had said war does not exist by the act of Mexico, she is not a belligerent against us. and we prohibit the President from repelling her invasion. The question I put is, Would not Mr. Polk have had exactly the same power under the Constitution, and would it not have been his duty to execute it, Congress or no Congress? I think it would.

Mr. DANIEL. The Senator is putting a very extreme and, I might say, a preposterous case.

Mr. HOAR. Mr. Clay did not think so.

Mr. DANIEL. Oh, well; political speeches made by gentlemen who are candidates for the Presidency very often overstate the facts, are very often exaggerations, and irradiate the landscape with colors we never see in real life.

I can not conceive of a case in which a Congress of the United States, loyal to the country, would state a fact contrary to the manner in which it existed, and declare that there was peace with a nation which had its armed men upon our soil. It would be a case of anarchy. Such extreme suggestions confuse rather than elucidate interpretations, and I might well say as to them, "Sufficient unto the day is the evil thereof."

But so far as the Constitution is concerned, so far as the Constitution gives to Congress alone the power to declare war and gives it authority to prescribe rules and regulations for the government of its armies, in a constitutional sense, and reading the instrument according to its intent and meaning, I can never conceive that the President of the United States could override a law of Congress and make war upon another nation when the power in the country which has the sole power of declaring war refuses to declare it or to tolerate it.

The reason why Mr. Polk was justified in marching his army into Mexico and attacking the Mexicans was because he was confronted with a fact, and that fact was the invasion of his own country. It was not a declaration of war by the United States against Mexico, but an exercise of the inherent and natural right of self-defense—to execute the laws by repelling those who trod upon them—to shoot back at a man who commences first to shoot at you. These questions of constitutional law are very simple. There is no trouble about their elucidation and solution by the most simple rules of common reason and common sense.

THE JUDICIAL PRECEDENTS.

I wish to say upon this subject as to a possible conflict of authority between Congress and the President, that so far as the judicial precedents have developed there is no precedent distinctly

in point; none in which there has ever been a collision of authority between the lawmaking and the executive power. It is to be observed, also, that there is no specific power in the Constitution, shaped in so many words, authorizing anybody in this country to recognize the independence or the belligerency of a foreign state or nation. In whomsoever that power may exist (and that it does exist none can dispute), it is a power implied from their being invested with the right to exercise some other power to which it becomes the essential incident.

That being the case, I do not question that there may be cases in which the President may recognize the independence of a foreign nation, because he may receive ambassadors, because he may appoint ambassadors, nor the belligerency of a foreign nation, because a condition of war, which is the belligerency of a foreign nation, devolves upon the President the duty and right to see that our laws of neutrality between those who are belligerent are observed, as President Washington did in 1793 between two established nations which were belligerents.

It matters not what may be the age of the nation; it matters not what may be the legal status of the nation. When a nation becomes belligerent, we have laws which apply to it as a belligerent, and having laws which apply to it, which the President is charged to see are executed, he is vested by law as well as by the Constitution with the power to recognize and realize the conditions to which he must apply the law.

Furthermore, I observe that no case has yet arisen in which it was necessary to determine whether the power exercised by the President was exclusively vested in him. It being vested in him in certain conditions and by certain implications, it has never been challenged in the sense that any conflicting power of Congress has been arrayed against him, and as a rule he has always been guided by the fact, and in recognizing the fact has simply pursued the dictates of his own intelligence in executing the law.

No case has arisen in which the President has exercised the power of recognition in which he has not been sustained by the courts.

The courts look to the political, as contradistinguished from the judicial, department to take cognizance of the political changes which take place in the revolutions and vicissitudes of nations, as, for instance, in the case of the *Nueva Anna*, Wheaton, 193 (1821), where the Supreme Court refused to recognize the existence of any lawful court of Mexico at Galveztown, which had assumed, under authority of the Mexican Republic, to condemn the cargoes of two Spanish ships, basing its action on the fact that the Government of the United States had not hitherto recognized "the existence of any Mexican republic or state at war with Spain."

In The United States *vs.* Palmer, in 3 Wheaton, 648, I find language of the Supreme Court which meets with my most hearty approbation as containing the law of this subject:

> This court is further of opinion that when a civil war rages in a foreign nation, one part of which separates itself from the old-established government and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the Government of the United States. If the Government of the Union remains neutral, but recognizes the existence of a civil war, the courts of the Union can not consider as criminal those acts of hostility which war authorizes, and which the new government may direct against the enemy.

"The legislative and executive departments of the United States." That is the language of the court.

Now I read again from a more recent decision of the United States Supreme Court, Jones against The United States, 137 United States Reports, page 212 (1890), in which Judge Gray gave the unanimous opinion of that tribunal:

> Who is the sovereign de jure or de facto of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court and has been approved under a great variety of circumstances.

So in a still more recent decision in the case of the *Three Friends* by the Supreme Court of the United States they speak of the "political department of the Government" as contradistinguished from the judicial, and not of the executive as contradistinguished from the legislative as the department which has proper and suitable jurisdiction of the subject-matter.

A LEADING CASE, SHOWING THE POWER OF THE PRESIDENT IS DERIVED FROM HIS DUTY TO EXECUTE THE LAWS.

I will read from a leading case on this subject, in which I think it will appear clearly that according to the decision of the Supreme Court made in that particular case, and in concurrence with the views which I have just presented from two other cases, it is the view of that court that the executive power to recognize the independence or the belligerency of a foreign nation is a power derived from executive duty to take care that the laws are faithfully executed.

From the fact that in either nominating an ambassador or in receiving an ambassador the President of the United States must impliedly pass upon the question in some cases whether or not another nation is belligerent or independent, it does not follow that under that particular power he may get the authority to pass upon that question in all cases. But there is no conceivable case that I can imagine in which a foreign government has assumed a belligerent attitude toward another, or in which a new government has made itself belligerent, that it does not come within the purview of the Presidential power, in the exercise of its duty to take care that the laws are faithfully executed, to make the proper recognitions which are necessary in order to execute the laws faithfully.

In the Prize Cases, reported in 2 Black, this whole subject was thoroughly reviewed by Judge Grier in a very able and instructive opinion of the United States Supreme Court. That was a case in which the President of the United States had declared a blockade against certain ports in the South. The paragraph which I shall read appears to my mind to contain a true indication of the source of executive power:

> By the Constitution—

Says the Supreme Court—

> Congress alone has the power to declare a national or foreign war. It can not declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power.

Now, what is that?

> He is bound to take care that the laws be faithfully executed. He is Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United

States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations and to suppress insurrection against the government of a State or of the United States.

Mr. President, there is no recognition and there is no war made by the Executive of the United States that may not be traceable to the Constitution and the statutes made as thus pointed out by the Supreme Court of the United States to enable the Executive to faithfully execute the laws. When President Polk sent the armies of the United States to meet those of Mexico, he acted under an act of Congress by which he had the right to repel invasion.

As Commander in Chief of our forces, if at any time an enemy to the United States were to appear in his presence or to assail us in any direction, the laws are plenary and ample to enable the President to recognize whatever condition of things presents itself, and to deal with it in a defensive way or in an offensive-defensive way, as the facts of the time and the occasion might suggest to his conscience and comprehension.

Mr. President, in all these cases it is recognized by the courts that have given their opinion (though I have no doubt that some obiter dictum of a judge may be found here and there from which a different inference might be drawn) that it is the great character of the President as Commander in Chief of our Army and Navy and as the Chief Executive to see to it that our civil laws are administered, from which he may derive all his rights to realize and to recognize the conditions which are presented to him when he proceeds to carry out his constitutional prerogative and his legal authority.

The very statement of his power implies the fact that he is under the laws of this country; that he is a creature, both as Commander in Chief of the regulations which Congress may pass for the guidance of his conduct, as well as for the guidance of the conduct of any other soldier in the Army of the United States; that as President, while he may exercise those functions which are purely executive without dictation from Congress, in the great mass of those duties they themselves consist in seeing to it that the laws are faithfully executed; that by the very terms of the statement of the power employed, the lawmaking power is above the executor of the law, and that he is the agent, the executive agent, of the people, simply to carry out and to do in our domestic relations and in our foreign relations those things which the lawmaking agent of the people has prescribed for him to do.

THERE IS NOTORIOUS PUBLIC WAR IN CUBA.

Mr. President, there has been a condition of public war in the Island of Cuba for two and a half years. The diplomacy of the Spanish Government has succeeded in blinding the eyes of the diplomatists of the United States to the realization of that fact. They have disowned and repressed and concealed under diplomatic expressions the fact instead of recognizing it. But the world knows the fact that there is war in Cuba, high-handed, red-handed, bloody, lamentable, cruel, savage war—war which has resounded all over the universe; that has filled our prints with its hideous scenes, and touched our hearts with its piteous cries.

We know it, Mr. President. There is war in which Spain has employed to put down the Cuban insurrection a larger army than

any government of the Old World ever sent against an American revolution—a larger army than the great British Government itself ever sent to put down the insurrection of the colonies of 1776, and it has been opposed by armies upon the other side.

It may be that the tactics of the forces of the Cuban Republic armies have been such tactics as George Washington advised Braddock to follow when he assailed the Indians in the wilderness, not to march in solid divisions, where they could be mowed down by the artillery and the train bands of Spain, but to attack the enemy where and when they could, with such weapons as they had the opportunity to employ, and shaping their tactics and strategy according to the country and the population, the sources of supply, and the exigencies of the hour.

The late President of the United States told us in his message last December that "the insurrection in Cuba still continues with all its perplexities," and that "if Spain still holds Habana and the seaports and all the considerable towns, the insurgents still roam at will over at least two-thirds of the inland country."

Innumerable Spanish victories on paper are always being heralded, and peace is constantly being proclaimed from the housetops of the Captain-General and the dens of Morro Castle; but the insurgents still roam around over the island, while nearly a fourth of the 200,000 troops of Spain have perished, and anarchy is ripping up and burning everything amidst scenes of devastation, desolation, murder, arson, poverty, disease, and starvation. They are making deserts and calling them peace; making proclamations and calling them peace; making war and calling it peace. We are just now sending bread and clothes to the hungry and naked fugitives of our own blood who are being corralled in cities, and hying hither and thither to find shelter from the peace that nestles under the Spanish torch, and the Cuban sword. But we all know here that this is war; the American people know that this is war; Europe and the world know that this is war—public war; as public as Cuban and Spanish armies can make it; as public as telegraph and printing press can make it; as public as any other patent, notorious, and irrepressible fact.

Mr. President, when Congress undertakes to recognize that fact about which we have abundance of Presidential messages depicting all the deplorable incidents of this long and bloody struggle, we are met here in the Senate of the United States with the statement that Congress must not recognize what everybody knows, must not demean itself in the spirit of neighborship and humanity toward a struggling people who are at our doors, because it may be conceived to be inimical to Spain. I should not be restrained by that consideration from recognizing the fact as it appears to me, but this argument is a misconception of law. It is not inimical to Spain.

We have a right in all good friendship to Spain. If Spanish friendship is so precious a thing as to be preferred to the rights of human nature, it is no breach of friendship with Spain for us to recognize with respect to one of her colonies what she realizes and what all Europe realizes, and what the United States through its President and generals realized when we had civil war in this country, that when the guns were thundering they could hear their thunder, that when the soldiers were marching and fighting they could see them marching and fighting. It is not only our right, it is our duty, as intelligent and conscientious men, to ap-

prehend, comprehend, realize, and conduct ourselves according to the fact of which our senses, certainly our senses of hearing and sound, take notice.

HUMANITY PROMPTS THIS RESOLUTION.

If I am actuated or moved to urge this action upon the Senate because in my own breast I sympathize with an oppressed people, it is no motive for which I owe anyone an apology. It is an honest and noble sympathy. It is a fact that there is war in Cuba, whether we record it in our resolution or not; it is a fact that there is public war in Cuba, whether we sympathize with Cuba or with Spain; and it being the fact, it is an act of humanity for us to deal with it according to the fact, and to throw the moral weight of this great Government toward seeing to it that that war is conducted with as close an approximation to Christian usages and to civilized customs as may be practicable under the circumstances.

WHERE INTEREST LIES.

I know that in some respects it may be detrimental to some interests here or there to recognize the belligerency of the Cubans. To recognize their belligerency on the part of the United States is to change our attitude legally and commercially in certain respects. But on the whole, I believe that this nation will derive advantage from recognizing the belligerency of the Cubans. All laws and treaties which are now in force with Spain will still remain in force.

It may subject some of our vessels to the right of search and to certain annoyances, but for the sake of doing justice and acting rightly these annoyances ought not to be weighed in the balance. It will give to the Spanish Government the right to blockade the Cuban ports, if she pleases so to do, but she would already have done that if she were prepared to do it and if it were their interest to do it, and if she should do it hereafter she will suffer more than we.

In the next place, it does relax to some extent the responsibility of Spain on account of atrocities committed or damages inflicted on our citizens in that island. I would about as soon hold the Cuban Republic responsible for what is done by their troops or by their agencies as to hold Spain. It is a swap from one to the other, in which there is little choice from a pecuniary standpoint. It can not be a very disastrous one, and even if we did lose something for our own citizens in the matter of recovering damages, for the cause of human justice, of human liberty, and for the dignified and honorable course of the United States I for one would be well willing to pay the price. Justice and liberty and honor are cheap at any price.

THIS RESOLUTION DOES NOT MEAN WAR.

Mr. President, it is said that this means war. I deny it. If Spain should declare war against us, if she should seek to foment war against us, because we recognize the belligerency of her former subjects who have been fighting her two and a half years, she will have an unjust cause of complaint and war against us, and we will have a just cause of complaint and war against her. I do not wish to see the American people involved in war. I look upon war as one of the greatest calamities that can befall the human race.

But there is one other much greater calamity, and that is for the high public spirit of a great nation to be so deadened that it can look upon plunder and pillage and murder and arson with indifference, and can stifle truth for venal considerations. It is worse than war for the public spirit of that nation to be so deadened that it hesitates or delays one instant to go forward and do any act of high and great justice because of fear of war.

If Spain were a greater and more powerful nation, if she had tenfold the power she has, the dignity of the case would inspire the Government of the United States to act more quickly and without such prurient sentimentality and tenderness as that professed for an old nation which clings with beak and talons to the last American possession yet within her grasp.

OUR PECULIAR RELATIONS TO CUBA—WE GAVE THEM THEIR EXEMPLAR.

A few words more, Mr. President, and I am done. This is not the ordinary case of the belligerency of one segment of an ancient empire or state against the old and established government. Geographically speaking, Cuba is a part of the American continent. It is right by us, and all the writers of international law realize and write down their views that humanity in such a case is a just ground for intervention. If this were an intervention, we could multiply the texts of international writers and publicists, including the late President of the United States, to show that it is good ground for the interference of this great nation.

But there is a higher ground, Mr. President, on which it is due from the United States that we should act with a high spirit of justice and consideration toward the struggling Cubans. If they are trying to throw off the yoke of an old government which has been oppressive to them, which has burdened them with taxes which they can but poorly bear, which has denied to them the representation which, as we maintain, is the right of freemen, let me remind the people of the United States here and now that, however they may preach upon this subject, they were themselves the great nation that set the Cuban patriots this example.

Our fathers did just that thing a hundred years ago which they are doing. It is we who have promulgated the principles, it is we who have preached the doctrines, it is we who have done the things that Cuba points to to-day and conjures her brave men to imitate and follow.

WE HAVE WARNED OTHER NATIONS NOT TO INTERFERE WITH CUBA.

But more than that, Mr. President, we have assumed from the very foundation of this Republic, as we were so aptly reminded by the Senator from Nevada [Mr. STEWART] to-day, a peculiar relation to the Cuban isle. We have said to Great Britain, we have said to France, we have said to Germany, we have said to all the nations of this earth, "Cuba is in natural affinity with the American Republic. It is a fortress that is hard by our sea gates. We will not allow you to go there and rescue these suffering people. We will not permit you to extend over that island a stable, wholesome, established government. We will not allow you to intrench yourselves there. We will not allow you to meddle with this subject at all. Stand off, stand off, and attend to European policies. We are the great western nation. We are the young, rich, and powerful heir of time, and we are to dictate, and to guide, and to rule, and to control, and to shape the destinies of the great American continent."

Having taken that attitude, which was to our advantage, having taken that attitude for the purpose of working out our own development and defending our own liberties, are we going to say that we will not bear the burden of that attitude, and are we going to back down from it the very first time it presents to us an inconvenience or a troublesome complication?

When a great nation goes forward and announces a great general principle, when it enunciates its destiny and its intentions to the nations of the earth, it can no more recede with honor from that proposition made than a soldier can abandon a flag which he is instructed to plant upon a rampart. We will be looked upon by other nations, if we avoid that responsibility, as a nation that makes much bluster and brag, but that does not stand up to its essential, moral, legal, and international obligations.

Realizing that to be an obligation, one of equity, one of fraternity, one of neighborship, and one which points its prophetic finger to the future career of the American continent, I would not have this country act hastily about it; I would not have it act incautiously about it; but in clear vision and by sure-footed steps, by graded paces from which we should never recede, I would go forward and let the people in Cuba know that we expect them to be accorded by Spain belligerent rights; that their prisoners are to be treated as prisoners of war and not shot down as dogs; and that Christian civilization, through the voice of the American Republic, gives to them, and demands for them, all the respect and consideration which go with the right of war.

Let us recognize the belligerency of the Cuban people, which is a fact; and in sending to our own people in Cuba bread, as we have done, as an act of charity, let us act toward those who are engaged in this awful strife with an equal spirit of justice. [Applause in the galleries.]

The PRESIDING OFFICER (Mr. WELLINGTON in the chair). Order must be preserved in the galleries.

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